

FILED
LODGED
ENTERED
RECEIVED

AUG - 7 2003

AT SEATTLE
CLERK U.S. DISTRICT COURT
BY WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

STEPHEN S. LOWBER,

Defendant.

NO. CR03-333 Z

PLEA AGREEMENT

The United States of America, by and through John McKay, United States Attorney for the Western District of Washington, and Jeffrey B. Coopersmith and Mark Chutkow, Assistant United States Attorneys for said District, and the defendant, STEPHEN S. LOWBER, and his attorneys, Walter F. Brown, Jr., and Susan D. Resley, enter into the following Agreement, pursuant to Federal Rule of Criminal Procedure 11(c):

1. Waiver of Indictment. Defendant, having been advised of the right to be charged by Indictment, agrees to waive that right and enter a plea of guilty to the charge brought by the United States Attorney in an Information.

2. The Charge(s). Defendant, having been advised of the right to have this matter tried before a jury, agrees to waive that right and enter a plea of guilty to the following charge contained in the Information: Accessory After the Fact to Wire Fraud, in violation of Title 18, United States Code, Section 3. By entering this plea of guilty, Defendant hereby waives all objections to the form of the charging document.

1 Defendant further understands that before entering his plea of guilty,
2 Defendant will be placed under oath. Any statement given by Defendant under oath
3 may be used by the government in a prosecution for perjury or false statement.

4 3. Elements of the Offense.

5 (a) The elements of the offense of Accessory After the Fact to Wire
6 Fraud, as charged in the Information, in violation of Title 18, United States Code,
7 Section 3, are as follows: (1) the defendant knew that one or more other persons had
8 committed an offense against the United States, such as the crime of Wire Fraud, in
9 violation of Title 18, United States Code, Section 1343, the elements of which are set
10 forth below in subparagraph (b); and (2) the defendant received, relieved, comforted,
11 or assisted such other person or persons with the intent to hinder or prevent their
12 apprehension, trial, or punishment.

13 (b) The elements of Wire Fraud, in violation of Title 18, United States
14 Code, Section 1343, are as follows: (1) the person(s) charged with the offense
15 knowingly and willfully made up a scheme or plan to defraud or for obtaining money
16 or property by making false promises or statements; (2) the person(s) knew that such
17 promises or statements were false; (3) the promises or statements were of a kind that
18 would reasonably influence a person to part with money or property; (4) the person(s)
19 acted with the intent to defraud; and (5) the person(s) used, or caused to be used, wire
20 communications in interstate commerce to carry out an essential part of the scheme.

21 4. The Penalties. Defendant understands that the statutory penalties for the
22 offense of Accessory After the Fact to Wire Fraud, as charged in the Information, are
23 as follows: imprisonment for up to two and one half (2.5) years, a fine of up to one
24 hundred twenty-five thousand dollars (\$125,000.00), a period of supervision following
25 release from prison of between two (2) and three (3) years, and a one hundred dollar
26 (\$100.00) penalty assessment. Defendant agrees that the penalty assessment shall be
27 paid at or before the time of sentencing.
28

1 Defendant understands that in addition to any term of imprisonment
2 and/or fine that is imposed, the Court may order Defendant to pay restitution to any
3 victim of the offense, as required by law.

4 Defendant agrees that any monetary penalty the Court imposes, including
5 the special assessment, fine, costs or restitution, is due and payable immediately, and
6 further agrees to submit a completed Financial Statement of Debtor form as requested
7 by the United States Attorney's Office.

8 Defendant understands that supervised release is a period of time
9 following imprisonment during which he will be subject to certain restrictions and
10 requirements. Defendant further understands that if supervised release is imposed and
11 he violates one or more of its conditions, he could be returned to prison for all or part
12 of the term of supervised release that was originally imposed. This could result in
13 Defendant serving a total term of imprisonment greater than the statutory maximum
14 stated above.

15 5. Rights Waived by Pleading Guilty. Defendant understands that, by
16 pleading guilty, he knowingly and voluntarily waives the following rights:

- 17 a. The right to plead not guilty, and to persist in a plea of not guilty;
- 18 b. The right to a speedy and public trial before a jury of Defendant's
19 peers;
- 20 c. The right to the effective assistance of counsel at trial, including, if
21 Defendant could not afford an attorney, the right to have the Court appoint one for
22 Defendant;
- 23 d. The right to be presumed innocent until guilt has been established
24 at trial, beyond a reasonable doubt;
- 25 e. The right to confront and cross-examine witnesses against
26 Defendant at trial;
- 27 f. The right to compel or subpoena witnesses to appear on
28 Defendant's behalf at trial;

1 g. The right to testify or to remain silent at trial, at which trial such
2 silence could not be used against Defendant; and

3 h. The right to appeal a finding of guilt or any pretrial rulings.

4 6. Applicability of Sentencing Guidelines. Defendant understands and
5 acknowledges the following:

6 a. The United States Sentencing Guidelines, promulgated by the
7 United States Sentencing Commission, are applicable to this case;

8 b. The Court will determine Defendant's applicable Sentencing
9 Guidelines range at the time of sentencing;

10 c. The Court may impose any sentence authorized by law, including a
11 sentence that, under some circumstances, departs from any applicable Sentencing
12 Guidelines range up to the maximum term authorized by law;

13 d. The Court is not bound by any recommendation regarding the
14 sentence to be imposed, or by any calculation or estimation of the Sentencing
15 Guidelines range offered by the parties, or by the United States Probation Department;
16 and

17 e. Defendant may not withdraw a guilty plea solely because of the
18 sentence imposed by the Court.

19 7. Ultimate Sentence. Defendant acknowledges that no one has promised or
20 guaranteed what sentence the Court will impose.

21 8. Restitution. Defendant shall make restitution to any victims of the offense
22 in the amount determined by the Court at sentencing, with credit for any amounts
23 already paid. Said amount shall be due and payable immediately and shall be paid in
24 accordance with a schedule of payments as set by the United States Probation Office
25 and ordered by the Court.

26 9. Loss Amount. The United States and Defendant agree that the correct
27 amount of the loss is between one million five hundred thousand dollars (\$1,500,000)
28

1 and ten million dollars (\$10,000,000) for purposes of USSG § 2F1.1(b)(1) (Nov.
2 2000), and USSG § 2X3.1 (Nov. 2000).

3 10. Statement of Facts. The parties agree on the following facts in support of
4 Defendant's guilty plea and for purposes of calculating the base offense level of the
5 Sentencing Guidelines. Defendant admits he is guilty of the charged offense.

6 a. Cutter & Buck, Inc. (the "Company"), is a Washington corporation
7 headquartered in Seattle, Washington. The Company, which was founded in 1990,
8 designs and distributes upscale sportswear. The Company sells, among other things,
9 logo-bearing sports shirts sold at golf tournaments and corporate events. At all relevant
10 times, the Company sold its products primarily through four channels: golf pro shops
11 and resorts, corporate accounts, specialty retail stores, and Company-owned retail
12 stores. The Company's common stock is registered with the United States Securities
13 and Exchange Commission pursuant to Section 12(g) of the Exchange Act, 15 U.S.C.
14 § 78l, and has been quoted on the NASDAQ Stock Market since the Company's 1995
15 initial public offering.

16 b. Stephen Scott Lowber, the defendant, joined Cutter & Buck as
17 Chief Financial Officer in 1997, and resigned from the company in August 2002.
18 Lowber is a Certified Public Accountant and has worked continuously in the financial
19 accounting field as an outside accountant, a corporate controller, and/or a chief
20 financial officer for almost twenty five years. Prior to joining Cutter & Buck, Lowber
21 had never been employed directly by a publicly-traded company, including as Chief
22 Financial Officer, and had never worked for any company involved in the apparel
23 business.

24 c. At all relevant times, the Company operated on a fiscal year
25 beginning May 1 and ending the following April 30. For the fiscal year ending
26 April 30, 2000, the Company reported revenue of \$152.5 million and earnings of \$10.6
27 million, an increase of 42% and 33% respectively over fiscal year 1999. The Company
28

1 reported revenue of \$54.6 million for the fourth quarter of fiscal year 2000, a 35 %
2 increase over the fourth quarter of fiscal year 1999.

3 d. On August 12, 2002, the Company announced that it would restate
4 its financial statements for fiscal years 2000 and 2001. The announcement caused
5 Cutter's stock price to drop from \$4.02 to \$3.44, or 14%, the following day. In April
6 2000, at the time of the improper transactions at issue here, the Company's stock was
7 trading in the range of \$10 to \$12 per share.

8 e. In October 2002, in its Form 10-K for the fiscal year ended
9 April 30, 2002, the Company restated its audited financial statements for fiscal years
10 2000 and 2001. The Company explained that the restatement resulted from the
11 improper recognition of revenue for shipments to distributors in April 2000, as well as
12 from a Company practice of shipping products in advance of customers' requested
13 shipment dates. (The Company reduced its reported revenue for the fourth quarter of
14 2000 from \$54.6 million to \$53.9 million; the reversal of \$5.7 million in revenue from
15 the improper distributor deals discussed below was offset by several million dollars of
16 "early shipments" deferred from prior quarters into the fourth quarter.)

17 f. At all relevant times, the Company took an aggressive approach to
18 sales that involved the use of accounting techniques known as "earnings management."
19 This was most evidently manifest in the Company's long-standing practice of "early
20 shipping." Dating back to at least 1995, the Company routinely shipped products to
21 customers in advance of the shipping dates requested by the customers. By at least
22 1999, the Company engaged in early shipments primarily to meet analysts' revenue
23 expectations. That is, the Company's shipments-to-date were compared to the
24 expectations of analysts who followed the Company's stock. Regardless of whether or
25 not customers wanted to receive the Company's products early, the Company shipped
26 the products early and recognized the revenue from the sales at the time of the
27 shipments. In effect, this enabled the Company to borrow revenue from future periods
28 for purposes of reporting the Company's performance to shareholders and the general

1 public in current periods. The defendant knew and understood that by 1999 early
2 shipments were being used as a tool to manage earnings and meet revenue targets.

3 g. The practice of early shipping often interfered with customer
4 relationships. Many of the Company's customers were small clothing boutiques that
5 did not have the space to stock products that they were not ready to sell. (Few
6 customers actually returned the products. Customers were automatically provided with
7 extended payment terms for products shipped early. The payment terms (usually net
8 30) typically would not begin to run until the requested shipment date, regardless of
9 how far in advance of that date the products were shipped.) Notwithstanding the
10 customers' complaints, the Company continued to use early shipping as an earnings
11 management tool to meet analyst expectations. By late 1999, the volume of early
12 shipments had risen substantially, from several hundred thousand dollars per quarter to
13 \$2.3 million for the quarter ended October 31, 1999, and \$3.8 million for the quarter
14 ended January 31, 2000. (These amounts are based on the Company's subsequent
15 restatement. For purposes of the restatement, the Company restated revenue for all
16 shipments made more than thirty days before the customer's requested ship date.)

17 h. The growing reliance on early shipments to "make the numbers"
18 forecast by analysts had consequences. By essentially dipping into the orders for future
19 quarters, the Company began each quarter with a deficit. There was a substantial
20 quantity of early shipments in the third quarter of fiscal year 2000, and consequently a
21 substantial revenue shortfall going in to the fourth quarter of fiscal year 2000.

22 i. In April 2000, with the end of the fiscal year rapidly approaching,
23 the Company shipped \$5.7 million of goods to three purported distributors and
24 recognized the revenue in the quarter ended April 30, 2000. In actuality, these
25 distributors acted as warehouses. The distributors were wholly reliant on the Company
26 to deliver customers to them for the products, and the distributors had no ability or
27 obligation to pay for the products until they were sold through to the ultimate
28 customers. As a result, the revenue should not have been recognized. The government

1 does not have evidence that, at the time the Company entered into agreements with the
2 distributors, Lowber had actual knowledge that the distributors were wholly reliant on
3 the Company to deliver customers to them for the products, or that the distributors had
4 no obligation to pay for the products until they were sold through to the ultimate
5 customers.

6 j. The concept of shipping to distribution warehouses first arose at
7 the end of fiscal year 1999. In April 1999, the Company entered into an agreement
8 with Creative Marketing ("Creative"), a Southern California warehousing company.
9 Creative agreed to warehouse about \$774,000 of the Company's inventory. The
10 Company would locate customers and forward the sales to Creative for order
11 fulfillment; Creative had no ability or right to resell the products on its own. The
12 Company did not pay commissions to its sales staff for the shipment to Creative; rather,
13 salespersons received their commissions only when the products were sold through to
14 end-users. Although the Company was able to locate customers for most of the
15 inventory warehoused at Creative by November 1999, Creative returned about
16 \$200,000 in unsold merchandise to the Company by the end of the fiscal year. The
17 Company recognized the \$774,000 as revenue for fiscal year 1999, and reversed about
18 \$200,000 in fiscal year 2000 as a result of the returns. The government does not have
19 evidence that Lowber was aware of or involved in the 1999 arrangement with Creative.

20 k. In the fourth quarter of fiscal year 2000, the Company expanded
21 the distributorship arrangement to include two other distributors in addition to Creative.
22 The two additional distributors were Carolina Property Services in South Carolina
23 ("Carolina") and KayCee Enterprises in Kansas City, Missouri ("KayCee"). The
24 Company shipped a total of \$5.7 million worth of goods to these three distributors in
25 April 2000. None of the three distributors had the financial ability to pay for the
26 volume of products that was shipped. The distributors were unable to sell the goods
27 shipped from the Company unless and until the Company provided them with end-
28 users. In order to convince the distributors to place the orders, a sales employee of the

1 Company verbally assured them that they had no obligation to pay for any of the goods
2 until customers located by the Company paid the distributors. A sales employee of the
3 Company provided at least one distributor (Carolina) with a written "side letter" dated
4 April 24, 2000, that stated, among other things, "I promise you that you will not be
5 expected to pay for product until we have sufficiently sold the merchandise; you have
6 been paid for these invoices and receivables have been received by Carolina
7 Properties." The government does not have evidence that Lowber had actual
8 knowledge at the time the Company entered into the distributorship arrangements that:
9 (i) the distributors were unable to sell the goods shipped from the Company unless and
10 until the Company provided them with end-users; (ii) a sales employee verbally assured
11 the distributors that they had no obligation to pay for any of the goods until customers
12 located by the Company paid the distributors; or (iii) a sales employee provided any of
13 the distributors with written "side letters," including the April 24, 2000 "side letter"
14 described above.

15 1. Based on these assurances, Creative, Carolina, and KayCee
16 Enterprises sent the Company purchase orders in the amounts of approximately
17 \$3.6 million, \$1.3 million, and \$865,000, respectively. The purchase orders provided
18 that the distributors would pay for 50% of the products within ninety 90 days, 25%
19 within 120 days, and the final 25% within 150 days. These terms were extremely
20 generous compared to the Company's other orders. The distributors were assured that
21 they would not be bound by these terms if the Company's sales force failed to deliver
22 sufficient orders to them. The government does not have evidence that Lowber had
23 actual knowledge at the time of the purchase orders that the distributors were assured
24 that they would not be bound by these terms if the Company's sales force failed to
25 deliver sufficient orders to them.

26 m. On April 28, 2000, two days before the end of the Company's
27 fiscal year, the Company shipped \$5.7 million worth of inventory to the three
28 distributors and recognized it as revenue. In truth and fact, the orders placed by

1 Creative, Carolina, and KayCee were in the nature of consignments and were
2 improperly recognized as revenue under prevailing accounting standards.

3 n. On or about June 9, 2000, officers and employees of the Company
4 sent a letter to the Company's outside auditors representing, among other things, that
5 "[r]eceivables represent valid claims against the debtors indicated and do not include
6 amounts for goods shipped or services provided subsequent to the balance sheet dates,
7 goods shipped on consignment or approval, or other types of arrangements not
8 constituting sales." This representation was false with respect to the \$5.7 million worth
9 of merchandise shipped to Creative, Carolina, and KayCee. The government does not
10 have evidence that Lowber had actual knowledge at the time he signed the June 9,
11 2000, representation letter that the April 2000 distributorship arrangements were in the
12 nature of consignment shipments.

13 o. On or about July 31, 2000, at Seattle, within the Western District
14 of Washington, and elsewhere, officers and employees of the Company caused the
15 Company's 10-K for the fiscal year ending on April 30, 2000, which 10-K included
16 financial statements showing the recognition of \$5.7 million of revenue for the
17 shipments to the three distributors that were not in fact true sales, to be sent by wire
18 transmission in interstate commerce from Seattle, Washington, to an office of the
19 United States Securities and Exchange Commission ("SEC") in Alexandria, Virginia.
20 The 10-K and fraudulent financial statements were made available to the general public.
21 The government does not have evidence that Lowber had actual knowledge at the time
22 the July 31, 2000, 10-K with financial statements was transmitted that it included, as
23 sales, transactions that were in fact in the nature of consignment shipments.

24 p. By the fall of 2000, most of the \$5.7 million worth of inventory
25 that had been shipped to the three distributors remained unsold. The Company's
26 finance personnel, including Defendant, were informed that the distributors were not
27 making payments. Defendant and his staff determined that the distributors were only
28 paying the Company as products were resold to customers. At that time, Defendant

1 understood that the April 2000 shipments should not have been recognized as sales
2 revenue in the fourth quarter of fiscal year 2000.

3 q. In or around late 2000, Defendant resolved that the distributors
4 needed to return the products to the Company. Approximately \$3.8 million in products
5 were returned to the Company in or around April 2001. Although the entire \$5.7
6 million was originally recognized in the Company's corporate sales channel, Defendant
7 and other company officers and employees decided to spread the debit entries for the
8 returned inventory into four channels rather than just reversing the amounts in the
9 original corporate channel. Defendant knew that the purpose of this was to manage the
10 Company's earnings and to hide, from the Company's Board of Directors and from the
11 Company's outside auditors, that \$5.7 million had been improperly recognized as
12 revenue in fiscal year 2000. As Defendant knew, spreading the returns among the four
13 sales channels violated prevailing accounting standards. Defendant and other Company
14 officers and employees also willfully withheld information about the distributorship
15 arrangements from the Company's Board of Directors and the Company's outside
16 auditors for the purpose of hiding the fact that \$5.7 million of revenue had been
17 improperly recognized in the fourth quarter of fiscal year 2000. Further, Defendant
18 signed a management representation letter to the Company's outside auditors in March,
19 2001, confirming that all sales during the fourth quarter of fiscal year 2000 were valid
20 and that no such sales were consignment sales or other types of arrangements not
21 constituting sales.

22 r. Defendant knew by late 2000 that the Company's recognition of
23 \$5.7 million of revenue in the fourth quarter of fiscal year 2000, and the wire
24 transmission of the Company's 10-K with false financial statements on or about
25 July 31, 2000, was part of a fraudulent scheme. In fact, the fraudulent scheme
26 constituted, among others, the offense of Wire Fraud, in violation of Title 18,
27 United States Code, Section 1343. During the period beginning in the fall of 2000 and
28 ending on or about July 30, 2001, the date the Company completed and transmitted its

1 10-K for fiscal year 2001, Defendant assisted other officers and employees of the
2 Company in order to hinder and prevent the discovery of their conduct, which would
3 have led to their apprehension, trial, and punishment.

4 11. Cooperation.

5 a. Defendant shall cooperate completely and truthfully with law
6 enforcement authorities and the SEC in the investigation and prosecution of other
7 individuals and/or entities involved in criminal and/or unlawful activity. Such
8 cooperation shall include, but not be limited to, complete and truthful statements to law
9 enforcement officers and the SEC, as well as complete and truthful testimony, if called
10 as a witness before a grand jury, or at any state or federal trial, retrial, or other judicial
11 proceedings. Defendant acknowledges that this obligation to cooperate shall continue
12 after Defendant has entered a guilty plea and sentence has been imposed, no matter
13 what sentence Defendant receives; Defendant's failure to do so may constitute a breach
14 of this Plea Agreement.

15 b. Defendant understands that the United States will tolerate no
16 deception from him. If, in the estimation of the United States Attorney, information or
17 testimony provided from the date of the Plea Agreement proves to be untruthful or
18 incomplete in any way, regardless of whether the untruthfulness helps or hurts the
19 United States' case, the United States Attorney for the Western District of Washington
20 may consider that Defendant has breached this Plea Agreement.

21 c. The United States Attorney's Office for the Western District of
22 Washington, in turn, agrees not to prosecute Defendant for any other offenses, other
23 than crimes of violence, that Defendant may have committed in the Western District of
24 Washington prior to the date of this Agreement about which: (1) the United States
25 presently possesses information; or (2) Defendant provides information pursuant to this
26 Agreement to cooperate with the authorities.

1 d. The parties agree that information provided by Defendant in
2 connection with this Plea Agreement shall not be used to determine Defendant's
3 sentence, except to the extent permitted by USSG § 1B1.8.

4 e. In exchange for Defendant's cooperation, as described above, and
5 conditioned upon Defendant's fulfillment of all conditions of this Plea Agreement, the
6 United States Attorney agrees to consider filing a motion, pursuant to USSG § 5K1.1
7 permitting the Court to sentence Defendant to less than the otherwise applicable
8 Sentencing Guideline range.

9 f. Defendant agrees that his sentencing date may be delayed based on
10 the United States' need for his continued cooperation, and agrees not to object to any
11 continuances of his sentencing date sought by the United States.

12 12. Non-Prosecution of Additional Offenses. As part of this Plea Agreement,
13 the United States Attorney's Office for the Western District of Washington agrees not
14 to prosecute Defendant for any additional offenses known to it as of the time of this
15 Agreement that are based upon evidence in its possession at this time, or that arise out
16 of the conduct giving rise to this investigation. In this regard, Defendant recognizes
17 that the United States has agreed not to prosecute all of the criminal charges that the
18 evidence may establish were committed by Defendant solely because of the promises
19 made by Defendant in this Agreement. Defendant acknowledges and agrees, however,
20 that for purposes of preparing the Presentence Report, the United States Attorney's
21 Office will provide the United States Probation Office with evidence of all relevant
22 conduct committed by Defendant.

23 13. Voluntariness of Plea. Defendant acknowledges that he has entered into
24 this Plea Agreement freely and voluntarily, and that no threats or promises, other than
25 the promises contained in this Plea Agreement, were made to induce Defendant to enter
26 this plea of guilty.

27 14. Statute of Limitations. In the event that this Agreement is not accepted by
28 the Court for any reason, or Defendant has breached any of the terms of this Plea

1 Agreement, the statute of limitations shall be deemed to have been tolled from the date
2 of the Plea Agreement to: (1) thirty days following the date of non-acceptance of the
3 Plea Agreement by the Court; or (2) thirty days following the date on which a breach
4 of the Plea Agreement by Defendant is discovered by the United States Attorney's
5 Office.

6 15. Post-Plea Conduct. Defendant understands that the terms of this Plea
7 Agreement apply only to conduct that occurred prior to the execution of this
8 Agreement. If, after the date of this Agreement, Defendant should engage in conduct
9 that would warrant an increase in Defendant's adjusted offense level or justify an
10 upward departure under the Sentencing Guidelines (examples of which include, but are
11 not limited to: obstruction of justice, failure to appear for a court proceeding, criminal
12 conduct while pending sentencing, and false statements to law enforcement agents, the
13 probation officer or Court), the United States is free, under this Agreement to seek a
14 sentencing enhancement or upward departure based on that conduct.

15 16. Completeness of Agreement. The United States and Defendant
16 acknowledge that these terms constitute the entire Plea Agreement between the parties.
17 This Agreement only binds the United States Attorney's Office for the Western District

18 //

19 //

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 of Washington. It does not bind any other United States Attorney's Office or any other
2 office or agency of the United States, or any state or local prosecutor.

3 Dated this 7th day of August, 2003.

4
5
6 
STEPHEN S. LOWBER
7 Defendant

8
9 
WALTER F. BROWN, Jr.
10 Attorney for Defendant

11 
SUSAN D. RESLEY
12 Attorney for Defendant

13 
14 JEFFREY B. COOPERSMITH
Assistant United States Attorney

15
16 
MARK CHUTKOW
17 Assistant United States Attorney